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Supreme Court Of The United States

NO. 81-131
OCTOBER TERM 1981

Quinn-Moore, a Joint Venture d/b/a Texaco Truck Center, Luke Quinn; Mildred Quinn; Ed Moore; Carolyn Moore; The First National Bank in Little Rock; American State Bank; Arkansas Bankers Association; Arkansas Savings & Loan League; Arkansas Mortgage Bankers Association; Arkansas Credit Union League; Arkansas State Chamber of Commerce; Arkansas Automobile Dealers Association, Inc.; Commercial National Bank; First Arkansas Bankstock Corporation; First National Bank in Hot Springs; Fausett & Company; Rector-Phillips-Morse, Inc.; The Stephens Security Bank of Stephens, Arkansas; Union National Bank; Austin Wiggins Company; Worthen Bank & Trust Company ..... *Appellants*

vs.

Beverly J. Lambert, Bank Commissioner, State of Arkansas; Steve Clark, Attorney General, State of Arkansas; Arkansas State AFL-CIO; Acorn; Arkansas Consumer Research, Inc.; and Elizabeth McAllester ..... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

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MOTION TO DISMISS

III.

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move to dismss the

appeal herein taken on the grounds that the questions presented are so unsubstantial as not to need further argument.

IV.
STATEMENT

This case concerns the validity of the Arkansas 10% usury law, which prohibits the making of contracts for a greater rate of interest than 10% per annum. [1] Scores of witnesses appeared before the trial court which, on March 6, 1980, ruled that the state's usury law did not offend the Due Process Clause, the Commerce Clause, or the Equal Protection Clause of the Constitution of the United States. The decision of the trial court was affirmed by the Arkansas Supreme Court in *Quinn-Moore v. Lambert*, 272 Ark. 324, 614 S.W.2d 230 (1981).

On June 9, 1981, appellants filed a Notice of Appeal to the Supreme Court of the United States. On July 20, 1981, appellants filed a Jurisdictional Statement with the Court asking that the case be fully reviewed and that counsel be granted oral argument.

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees file this Motion to Dismiss on the grounds that the questions presented to the Court are so unsubstantial as not to need further argument.

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[1] Art. 19, §13, of the Arkansas Constitution provides:

"All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum."

ARGUMENT

V.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. INTRODUCTION

The question before the Court concerns the right of the people of Arkansas to regulate their own economy. The issue in the case is whether a state, pursuant to its police powers, may set a ceiling on the amount of interest which can be charged on contracts entered into within its borders. The matter was before the Court in the early part of this century, and when considered, was resolved in favor of the state. See *Griffith v. Connecticut*, 218 U.S. 563 (1910).

The right of a state to enact laws for the public health, safety, and welfare has been affirmed by the Court many times. However, in reviewing the cases in which the Court unquestionably deferred to the states the right to make policy decisions affecting the public welfare, one decision stands apart from all the rest as supporting the position of the appellees in the instant case. Ironically, that decision involved the validity of an Arkansas law enacted years ago to protect the public from dangerous practices in the railroad industry.

In *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968), reh. denied, 393 U.S. 1045 (1969), the Court was called upon to determine the constitutionality of the Arkansas "full-crew" laws, which specified the minimum number of

employees who must serve as part of a train crew on locomotives operating within the State. Arguments against the validity of the laws centered around the economic and technical developments within the railroad industry since the enactment of the statutes in the early 1900's. Essentially, the railroads argued that the justification for enactment of the safety measures no longer existed. In reversing the decision of the district court which held the statutes to be unconstitutional, the Court said:

> This summary [of the facts], taken from the evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, *and public policy can, under our constitutional system be fixed only by the people acting through elected representatives.* (Emphasis added).

393 U.S. at 138.

In determining that the public policy of the State of Arkansas ought to be given highest priority by courts of law, the Court added:

> In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elective representatives as to the price society should pay to promote safety in the railroad industry.

393 U.S. at 144. Likewise, the Court in the instant case, should not invoke the judicial power to nullify the decision of the people of Arkansas as to the price society should pay for the use of money.

Unquestionably, the people of the State of Arkansas have the power to enact legislation setting out the public policy of the state with regard to usury. See *Griffin v. Connecticut*, 218 U.S. 563 (1910). This being the case, the Court should not sit as a super legislature to evaluate the economic wisdom of the Arkansas law. As stated by the Court below:

> Ultimately the question in this case narrows down not to an issue of constitutional law but to one of public policy: What should be the maximum interest rate in Arkansas? The appellants' extensive testimony can certainly be interpreted to indicate that on balance the present effect of our 10% usury ceiling is not favorable to the state's economy as a whole. There is also testimony to the contrary. We are not called upon, however, to pass judgment upon the wisdom of our usury law. If it is to be changed, it must be done by a popular vote, not by judicial decision.

614 S.W.2d at 233.

Inasmuch as the issue of whether a state may enact laws to protect the public from excessive interest rates has been affirmatively answered by the Court in the past, and since the decision of what should be the maximum rate of interest allowable in a state is a question of public policy, appellees submit that the case at bar is in need of no further argument. Accordingly, the appeal should be dismissed.

B. THE ARKANSAS USURY LAW DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In their zeal to convince the Court that the Arkansas 10% usury law violates the Due Process Clause of the

United States Constitution, appellants cite the Court to 40 cases in support of the proposition that governments may not fix prices arbitrarily and unreasonably low. Jurisdictional Statement at 17-18. However, not one of the cases cited by appellants even suggests that the regulation of interest rates falls within the category of governmental price fixing. On the contrary, the cases relied upon concern the setting of public utility rates and the establishment of minimum price schedules, neither of which is before the Court in the instant case.

With regard to the public utility rate cases, appellants overlook the obvious distinction between public utilities and financial institutions: financial institutions are not required to accommodate all members of the public. As the Court below stated:

> [T]he clear-cut distinction is that a public utility devotes its property to the public service, must serve any and all members of the community without discrimination, and is therefore entitled to a guaranteed but reasonably limited return on its investment. By contrast, the appellants do not devote their property to the public service, are entitled to pick and choose those to whom they will make loans, and are not entitled to a guaranteed return of any kind.

614 S.W.2d at 232.

On the issue of price-fixing, appellants have failed to differentiate between maximum and minimum price limitation statutes. This distinction is important inasmuch as minimum price statutes preclude price cutting by efficient competitors, while maximum ceiling statutes prohibit the exaction of excessive charges to the public. The

Arkansas 10% usury law is a maximum ceiling statute established by the people to prohibit the taking of excessive interest by lenders. As such, the law is a legitimate exercise of the state's police power to protect the public health, safety, and welfare.

Appellants ask the Court to determine that state usury ceilings are subject to judicial review for reasonableness. They state that "the Arkansas usury law limit of 10% set in 1874 . . . cannot conceivably be rationally related to present day conditions." Jurisdictional Statement at 21. However, the Court was not persuaded by arguments of "changed circumstances" in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago R.I. & P.R. Co.*, 393 U.S. 129 (1958), and likewise should not be impressed by the unusual argument of counsel that present day lenders, like regulated public utilities, are entitled to a guaranteed rate of return on invested capital. In essence, appellants are asking the Court to consider the economic wisdom of the Arkansas usury law in light of today's market place. However, the Court has stated on more than one occasion that such questioning is not the function of the judiciary. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Ferguson v. Skrupa*, 372 U.S. 722 (1963). In *Ferguson*, the Court said:

> We refuse to sit as a 'super legislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the due process clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor or we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is of no concern of ours. The

> Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas. (Footnotes omitted).

372 U.S. at 731-732. Similarly, the Arkansas usury law may be economically sound or unsound. However, any change in the law is not for the court to make. Rather, any change must be left to the people.

This Court has recognized that states have broad discretion in enacting economic legislation. *Sproles v. Binford*, 286 U.S. 374 (1932). When the Arkansas usury law was proposed in 1873, interest rates in the state were at about 24% per annum. (T. 2202-2203) In order to limit the price society should have to pay for the use of money, the voters adopted the present constitutional prohibition against usury. According to the testimony presented by appellees' witnesses, the Arkansas law has served Arkansans well. Consequently, the law is reasonably related to the purpose for which it was enacted, and should be viewed by the Court as legitimate exercise of the state's power to enact economic legislation.

The people of the State of Arkansas have chosen to regulate the amount of interest which may be charged on contracts made within the state's borders. Such a determination of public policy has been upheld by this Court in *Griffith v. Connecticut*, 218 U.S. 563 (1910), and by several state courts. See *Cesary v. Second National Bank of North Miami*, 361 S.2d 917 (Fla.1979); *State ex rel Meierhenry v. Spiegel*, 277 N.W.2d 298 (S.D. 1979); *Whitaker v. Spiegel, Inc.*, 623 P.2d 1147 (Wash. 1981). Inasmuch as lending institutions are not regulated utilities, and since the Arkansas usury law does not constitute any identifiable form of price fixing, the Court should have no difficulty in disposing of appellants' due process claim.

C. THE ARKANSAS USURY LAW DOES NOT PLACE AN UNDUE BURDEN UPON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

In the event that a state constitutional provision or statute is challenged as being unconstitutional under the Commerce Clause,[2] the responsibility of the Courts is to determine "whether the national interest in the free flow of interstate commerce outweighs the particular state interest involved, such as protecting the public health, safety, or morality." 2c. Antieau *Modern Constitutional Law* §10:20 (1959).

In *Minnesota v. Cloverleaf Creamery Co.*, ___ U.S. ___, 101 S.Ct. 715 (1981), the Court was called upon to determine whether a Minnesota statute banning the retail sale of milk in plastic non-returnable containers was an undue burden on interstate commerce. In concluding that the law was a valid exercise of the state's police power, the Court noted that the statute prohibited all milk retailers from selling their products in plastic containers without regard to whether the sellers were from outside the State. Likewise, the Arkansas usury law is a valid exercise of the state's police power and uniformly applies to all contracts, without regard to the residency of the lender. Inasmuch as it "visits its effects equally upon both interstate and local business," it cannot be challenged as being violative of the Commerce Clause. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980).

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2 "The Congress shall have power . . . To regulate commerce . . . among the several states . . . ." U.S. Const., Art. 1, §8, cl. 3.

Assuming *arguendo*, that the state usury law has some impact on interstate commerce, that intrusion alone should not be used to invalidate the regulation. It has long been recognized that, "[i]n the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945).

The right of states to enact their own usury laws has been incorporated by Congress into the federal regulatory scheme. For example, in the "Omnibus Banking Act," Act of March 31, 1980, Pub. L. No. 96-221, §§501-512, 94 Stat. 1647-1648, codified at 12 U.S.C. §86a, Congress temporarily preempted state usury laws as they apply to mortgage, business, and agricultural loans. However, in recognition of the fact that national uniformity is not required with respect to interest rates, Congress granted to the states the right to opt-out of the usury preemption by a vote of the people. Thus, while appellants complain that the Arkansas usury law burdens interstate commerce, they cannot show any conflicting legislation by Congress which would prohibit the state from enacting a law pursuant to its police power in order to protect its citizens from excessive interest rates.

Appellants argue that the trial court and the Arkansas Supreme Court refused to declare the state's usury law an undue burden on interstate commerce primarily because there was no precedent on the question. Jurisdictional Statement at 23. However, appellants have overlooked three recent state Supreme Court decisions from other jurisdictions directly on point. In *State ex rel Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298 (S.D. 1979), the South Dakota Supreme Court found South Dakota's regulation of interest rates on revolving charge account agreements was not an

undue burden on interstate commerce. Likewise, the Florida Supreme Court in *Cesary v. Second National Bank of North Miami*, 369 So.2d 917 (Fla. 1979), upheld that state's regulation of interest rates when it was attacked on Commerce Clause grounds. And finally, in *Whitaker v. Spiegel, Inc.*, 623 P.2d 1147 (Wash. 1981), the Washington Supreme Court declared that Washington's 12% usury law did not impose an undue burden on interstate commerce.

Similarly, state regulation of interest rates has been upheld in federal courts. In *Aldens, Inc. v. Packel*, 524 F.2d 38 (3rd Cir. 1975), cert. denied, 425 U.S. 943 (1976), a federal court was called upon to determine whether the Pennsylvania usury statute violates the Commerce Clause of the United States Constitution. There the Court said:

> Considering, however, the historical recognition that the State may, despite the burden on interstate commerce, enact varying usury laws and varying contract laws, any judgment that the present proliferation of regulation of consumer credit transactions has burdened commerce unduly must be made by Congress.
>
> * * *
>
> [W]e decline to hold that the burden imposed by Pennsylvania on Aldens' interstate commerce by virtue [of the Pennsylvania statute] is so great that it outweighs the Commonwealth's interest in regulating the rates which its resident consumers may pay for the temporary use of money or the terms on which they may contract for such use.

524 F.2d at 48-49.

The fact that states have traditionally regulated a particular subject matter, *i.e.* usury, is a consideration which must be weighed in favor of local regulation on that subject matter being upheld. See *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944). There the Court said:

> The fact that particular phases of an interstate business or activity have long been regulated or taxed by the state has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the State regulatory and tax laws should be declared valid.

322 U.S. at 548-549.

For 136 of the 144 years of the existence of the State of Arkansas, the 10% usury ceiling has been a part of the state's law. Therefore, it can hardly be argued that regulation of interest rates in Arkansas is not a matter of local concern. Consequently, the state may exercise its police power to define usury even though interstate commerce may be affected. See *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

Absent any Congressional restriction on the right of states to regulate interest rates, the question before the Court is whether the burden imposed on commerce significantly outweighs any local benefits sought to be achieved by the enactment of the state statute. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). While appellants claim that "the state could attempt to prohibit excessive charges by lenders in a [more] rational, less oppressive manner", Jurisdictional Statement at 25, the Court should not superimpose its judgment over that of the people to determine which, if any, alternate method of regulation

exists. *See Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 142 (1968).

At trial, appellants' evidence established only that the Arkansas usury law is one factor, out of many, which may cause a temporary slowdown of the Arkansas economy. (T. 2703) In fact, the transcript reveals that expert witnesses for both parties agreed that a confluence of factors has resulted in the present economic condition of the State of Arkansas. While the state usury law may act to reduce the number of loans made by borrowers during tight money periods, appellees contend that this results in a benefit to the people of the state by reducing the amount of high-cost debt which they are required to assume during the same periods. (T. 2211) In other words, the usury provision accomplishes the very result for which it was intended—protection of Arkansas borrowers from excessive debt due to extremely high interest rates. This is a legitimate state purpose which the people of the State of Arkansas have reaffirmed three times in the last ten years by rejecting any change in the state usury law. This exercise of the state's police powers, to reduce the consumption of high cost debt during periods of high interest rates, helps to ensure that the state's economy will more readily resume a normal growth pattern following a national recession, or even depression. (T. 2221)

Throughout the course of the litigation, appellants have failed to identify the interstate commerce burdened by the Arkansas law. As the Court below noted:

> Apparently the reference [to the burden on interstate commerce] is to the flow of money when it is sent from one state to be lent or invested in another state. Certainly, according to the proof,

> money does leave Arkansas when out-of-state investments are available at a higher rate of interest. One witness testified, for example, that his bank loses investments in certificates of deposit whenever the interest rate elsewhere is more than a fourth of one percent above the Arkansas rate. Even so, that is apparently a natural result whenever one state, although halfway across the continent, offers a better investment opportunity than another. If that is an unconstitutional burden on interstate commerce, then such burdens occur constantly, and all interest restrictions become invalid. Every such argument is self-defeating.

614 S.W.2d at 232-233.

Appellants have not directly questioned whether the State of Arkansas has a legitimate interest in regulating interest rates to protect its citizens. The actual contention raised by them appears to be whether or not the 10% figure is a proper one. The testimony clearly shows that the Arkansas usury law has served its purpose to protect the citizens of this state from exorbitant interest rates. The law has enabled the State to adjust quickly to recessionary period, and to come out of it without expensive long-term, high-interest debt. The State's usury law is a policy decision of its citizens reflecting an economic philosophy which has been approved over and over again at the polls.

Inasmuch as there is no uniform national rule regulating interest rates, and since the Arkansas 10% usury law operates alike upon all whom it affects, appellees ask the Court to dismiss the appeal filed herein, and to affirm the decision of the Arkansas Supreme Court that the State's usury law does not unduly burden interstate commerce.

D. THE ARKANSAS USURY LAW DOES NOT DENY APPELLANTS EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants argue that the Arkansas usury law violates the Equal Protection Clause of the Fourteenth Amendment because of its unequal impact on different borrowers and lenders. However, because the provision does not classify borrowers, lenders, or loans, it is not the type of law which is properly subject to an equal protection challenge. As the Court below stated:

> The 10% usury limit contains no classification of any kind, has a similar effect upon all persons similarly situated, and thus cannot deny equal protection. The appellants merely mention differing remote consequences of the law, such as the small borrowers' inability to obtain a loan from certain banks in Little Rock because those banks cannot profitably lend small amounts. Almost every constitutional provision has indirect consequences that may effect different persons in different ways, *but there is no denial of equal protection unless the constitutional provision itself embodies an unreasonable classification.* (Emphasis added).

614 S.W.2d at 233.

Assuming *arguendo* that the state usury statute does contain some hidden classification, the Court should determine whether those classifications are rationally related to the achievement of the statutory purposes. See *Minnesota v. Cloverleaf Creamery Co.*, ___ U.S. ___, 101

S. Ct. 715 (1981). In the case at bar, the 10% usury law was enacted to protect the people from excessive interest rates. Inasmuch as witnesses for both sides stated that the law worked to prohibit individuals from entering into long-term, high-interest debt, the purpose of the legislation has been satisfied.

Even if the Arkansas law treated some groups of citizens differently than others, the Court has sanctioned many such laws in the area of economic regulation. See *McGowan v. Maryland*, 366 U.S. 420 (1961). In *McGowan*, a case which involved a challenge to the Maryland Sunday closing laws, the court stated:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which effect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. The state legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any stated facts reasonably may be conceived to justify it. (Citations omitted). (Emphasis added).

366 U.S. at 425-426.

The Arkansas 10% usury law operates alike upon all whom it affects. There is no constitutional or statutory classification of borrowers, lenders, or loans. As a matter of fact, the only disparity which exists today with regard to the amount of interest which may be charged to citizens of the state for the use of money results from several pieces of

federal legislation which temporarily preempt the Arkansas usury law. (See the *National Bank Act*, 12 U.S.C. §85, and amendments thereto including, but not limited to, Pub. L. No. 93-501, commonly referred to as the "Brock Bill"; Pub. L. No. 96-104, commonly referred to as the "Borrower's Relief Act"; Pub. L. No. 96-221, commonly referred to as the "Omnibus Banking Act").

Inasmuch as there is no classification within the Arkansas usury law, the Court is not required to apply the traditional equal protection rationality test. See *Vance v. Bradley*, 440 U.S. 93 (1979). Such being the case, the Court should have no difficulty in disposing of this final argument of appellants. Accordingly, the Court should dismiss the appeal, and uphold the decision of the State Supreme Court that the Arkansas 10% usury law does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

VI.
CONCLUSION

The Arkansas Constitutional Convention of 1874 framed a constitution which has been the foundation of government in this state for over 100 years. Article 19, §13 of that document is an expression of public policy that all contracts for a greater rate of interest than 10% per annum shall be void. Several attempts have been made over the years to amend this constitutional provision, or to simply do away with it; all of these efforts have failed. Undaunted by the resounding defeats accorded to every attempt to modify or amend the constitutional restriction, opponents of the 10% usury ceiling have taken their cause to the courts seeking to bring about indirectly that which they could not accomplish directly – abolition of the state's right to regulate its own economy.

The Court is being called upon to once again reaffirm the principle that a state may regulate the amount of interest charged by lenders for the use of money loaned within a state's jurisdiction. Appellants argue that such regulation by the State of Arkansas offends the Due Process Clause, the Equal Protection Clause, and the Commerce Clause of the Constitution of the United States. However, inasmuch as such arguments have been recently rejected by several state Supreme Courts, and since this Court many years ago declared that such economic regulation was within the police power of a state, the Court should dismiss the appeal on the ground that the questions

presented are so unsubstantial as not to need further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, three copies of the foregoing Motion to Dismiss have been served on counsel of record for appellants, Herschel H. Friday, Jr., Esquire, Friday, Eldredge & Clark, 20th Floor, First National Building, Little Rock, AR 72201, by depositing same in the United States Mail, with first-class postage prepaid, on the 20th day of August, 1981. In addition, copies of the Motion to Dismiss have been served upon all other counsel designated by appellants in the Jurisdictional Statement.

JOHN STEVEN CLARK

Counsel of Record for Appellees